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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. LOUIS JUARES AGUIRRE, Defendant and Appellant.	2d Crim. No. B218299 (Super. Ct. No. 2007016757) (Ventura County)

Louis Juares Aguirre appeals his conviction by plea to possession of methamphetamine for sale (count 1; Health & Saf. Code, § 11378), possession of methamphetamine while armed with a loaded firearm (count 2; Health & Saf. Code, § 11370.1, subd. (a)), and ex-felon in possession of a firearm (count 3; Pen. Code, § 12021, subd. (a)(1)).[1] Pursuant to a written plea agreement, appellant admitted a firearm enhancement on count 1 (§ 12022, subd. (c)) and a prior strike conviction (§§ 667, subds. (c)(1) & (e); 1170.12, subds. (a)(1) & (c)(1)), and admitted serving two prior prison terms within the meaning of section 667.5, subdivision (b). Appellant was sentenced to a stipulated nine-year prison term and claims sentencing error. We affirm.

[1] All statutory references are to the Penal Code unless otherwise stated.

Facts

On May 3, 2007, the Ventura Police executed a warrant to search an apartment belonging to appellant's sister. Appellant was in the upstairs bedroom, naked and in bed with a female. Appellant had a loaded .22 caliber revolver, a loaded shotgun, and half an ounce of methamphetamine. A police scanner was attached to the headboard monitoring police communications and the apartment was equipped with a camera surveillance system.

Appellant had an outstanding warrant for absconding from parole. Officers searched the bedroom and common areas and found a BB gun, three syringes, four glass pipes, methamphetamine, a loaded .38 caliber handgun, a digital scale and plastic baggies, 59.97 grams of marijuana, five blank prescriptions, currency, 21 shotgun rounds, several hundred .22 rounds, narcotics pay/owe sheets, drug paraphernalia and packaging materials, and a list of police radio frequencies.

As appellant was escorted to the police car, he said "Everything in the bedroom is mine. None of it belongs to anybody else." A parole hold was placed on appellant when he was booked. Appellant entered into a written plea agreement two years later and was sentenced to nine years state prison on count 1 and concurrent six and four year terms on counts 2 and 3.[2]

Section 654

Appellant contends that the trial court violated section 654 by not staying the sentences on count 2 and count 3. Counts 2 and 3, like count 1, are for possession of the same methamphetamine and .22 caliber handgun. Section 654 precludes multiple

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[2] On count 1 for possession of methamphetamine for sale, the trial court imposed a four year sentence (double the two-year midterm based on the prior strike), plus three years on the firearm enhancement (§ 12022, subd. (c)) and two years on the prior prison term enhancements (§ 667.5, subd. (a)). Appellant received a concurrent six-year term on count 2 for possession of a controlled substance with a firearm (double the three-year midterm) and a concurrent four-year term on count 3 for possession of a firearm by a felon (double the two-year midterm).

punishments for a single act or indivisible course of conduct. (*People v. Hester* (2000) 22 Cal.4th 290, 294 (*Hester*).)

Appellant, however, negotiated a nine-year sentence and did not object to possible concurrent terms when the plea was entered. California Rules of Court, rule 4.412(b) provides: "By agreeing to a specific prison term personally and by counsel, a defendant who is sentenced to that term or a shorter one abandons any claim that a component of the sentence violates section 654's prohibition of double punishment, unless that claim is asserted at the time the agreement is recited on the record."

In *Hester*, defendant pled no contest to felony assault, burglary, and dissuading a witness in exchange for a four-year sentence. He was sentenced to four years on the burglary count and a concurrent three-year term for felony assault. On appeal, defendant argued that the concurrent term violated section 654. (*People v. Hester, supra*, 22 Cal.4th at pp. 294-296.) Our Supreme Court held that defendant abandoned the claim by not objecting at the change of plea hearing. (*Id*., at p. 296.) "While failure to object is not an implicit waiver of section 654 rights, acceptance of the plea bargain here was. 'When a defendant maintains that the trial court's sentence violates rules which would have required the imposition of a more lenient sentence, yet the defendant avoided a potentially harsher sentence by entering into the plea bargain, it may be implied that the defendant waived any rights under such rules by choosing to accept the plea bargain.' [Citation] Rule [4.]412(b) and section 654 are, therefore, not in conflict. In adopting the rule, the Judicial Council merely codified one of the applications of the case law rule that defendants are estopped from complaining of sentences to which they agreed." (*Id*., at p. 295.)

Faced with a maximum sentence exposure of 27 years 8 months, appellant negotiated a very favorable plea in exchange for a nine-year sentence. Three felony counts, two misdemeanor counts, and various sentence enhancements were dismissed or

stricken.[3] The plea terms were expressed and agreed to in open court and set forth in a written plea agreement. It was stipulated that the trial court could consider the probation report, the police reports, the preliminary hearing transcript, and the dismissed counts at sentencing.

Appellant contends that he was not told that concurrent terms on counts 2 and 3 was part of the plea bargain. "Had [appellant] been truly surprised at the time of sentencing to find that concurrent terms were being imposed, his remedy would have been to attempt to withdraw his plea on the grounds of violation of the plea bargain. [Citation.]" (*Hester, supra,* 22 Cal.4th at p. 296.) He did not do so or object on section 654 grounds.

Having obtained the benefit of the plea agreement, appellant may not be heard to complain that component parts of the sentence violate section 654. (*Id*., at p. 295; see e.g., *People v. Couch* (1996) 48 Cal.App.4th 1053, 1056-1057; *People v. Valenzuela* (1993) 14 Cal.App.4th 837, 841; *People v. Giovani M.* (2000) 81 Cal.App.4th 1061, 1066) "[D]efendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process. [Citations.]" (*Hester*, *supra*, 22 Cal.4th at p. 295.)

Presence Custody Credits

Appellant was arrested May 3, 2007, and remained in custody until the June 3, 2009 sentencing hearing. The trial court awarded 682 days presentence custody credit: 455 days actual custody, plus 227 days conduct credit. (§§ 2900.5; 4019.) Appellant claims that he is entitled to an additional 365 days custody credit from May 3, 2007 to May 2, 2008 during the parole hold.

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[3] The trial court dismissed two counts for ex-felon in possession of a firearm with respect to the .38 caliber revolver and shotgun (counts 4–5), a felony count for possession of ammunition (count 6; § 12316, subd. (b)(1)), and two misdemeanor counts for wrongful interception of police radio communications (count 7; § 636.5) and possession of more than 28.5 grams of marijuana (count 8; Health & Saf. Code, § 11357, subd. (c)).

Section 2900.5, subdivision (b) provides that "credit shall be given only where the custody to be credited is attributable to proceedings relating to the same conduct for which the defendant has been convicted." Where, as here, "a period of presentence custody stems from multiple, unrelated incidents of misconduct, such custody may not be credited against a subsequent formal term of incarceration if the prisoner has not shown that the conduct which underlies the term to be credited was also a 'but for' cause of the earlier restraint." (*People v. Bruner* (1995) 9 Cal.4th 1178, 1193-1194.) This rule of " 'strict causation' . . . stems from the conclusion that section 2900.5 did not intend to allow credit for a period of presentence restraint unless the *conduct* leading to the sentence was the *true and only unavoidable basis* for the earlier custody." (*Id*., at p. 1192.)

The trial court correctly found that appellant was not entitled to duplicate presentence credits. When appellant was arrested, he had an outstanding warrant for absconding from parole. Had the methamphetamine and firearm charges not been filed, appellant still would have been remained in custody for violating parole.

Appellant claims that his parole was never revoked and that the parole revocation proceedings were dismissed. (See Cal. Code Regs., tit. 15, § 2606(b) [parole hold may not exceed one year].) A similar argument was made in *People v. Shabazz* (2003) 107 Cal.App.4th 1255. There, a parole hold was placed on defendant for absconding from parole after he was arrested for forgery. When defendant was sentenced on the new offense, he was still in custody on the parole hold and awaiting a hearing on the parole violation. (*Id*., at p. 1257.) The Court of Appeal held that defendant was not entitled to presentence custody credit because he could not show that "but for" the new crime, he would have been released from custody. (*Id*., at p. 1258-1259.) "[I]t was defendant's burden to show that the conduct that led to his conviction was the sole reason for his presentence confinement. [Citations.]" (*Id*., at p. 1259.) Citing *In re Marquez* (2003) 30 Cal.4th 14, the court stated: "In the event defendant's parole was never revoked or he was denied any credits by the Board of Prison Terms, he can seek a modification of the presence credit order in superior court." (*Ibid.*)

The same principle applies here. Defense counsel argued that the parole revocation proceeding was dismissed but offered no evidence on this claim.[4] The probation report stated that appellant "received 12 months 'ineligible' (no good time credit) for absconding from parole and the present matter. The scheduled [parole] release date was May 2, 2008."

The trial court correctly found that appellant was not entitled to presentence custody credits before May 2, 2008. (§ 2900.5; *People v. Bruner, supra,* 9 Cal.4th at pp. 1193-1195; *In re Joyner* (1989) 48 Cal.3d 487, 489.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

[4] Defense counsel argued that appellant "never actually had a parole revocation hearing. [¶] He waived – My understanding is that he waived that hearing, and at the end of 365 days, Parole chose to remove the hold that they [had] on him . . . . "

William R. Redmond, Commissioner

Superior Court County of Ventura

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